No. 7937

In the United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company, *Appellant*,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation), *Appellees.*

CLOSING BRIEF FOR APPELLEES.

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CLOSING BRIEF FOR APPELLEES.

INTRODUCTION.

We were rather surprised when we read appellant's original brief. The net result, after reading the last, is a feeling of astonishment, not only that an appeal should have been taken, but also that, with so many attorneys apparently interested, so much could have been printed with so little to assist an appellate court. The most that can be said is that they have presented for consideration everything that could be argued to a jury in an attempt to win its sympathy. There is certainly nothing for the consideration of a court listening to an appeal in an equity case.

We find counsel attempting to testify, at this late date, to their idea of appellant's character. (Br. p. 4.) Where argument fails, we find that counsel for appellees are "contemptible", because they foiled appellant in his scheme to defraud. We find the time worn "argument", employed before a jury, of attacking insurance companies, their tactics and motives.

We believe that everything which has been raised in this reply brief has been fully covered, in as concise a manner as possible, in the briefs filed by the various appellees. We hesitate between this feeling and a desire to be of any possible assistance to this court. We do not like to give the impression that we consider there is anything in this brief which merits further reply, and yet we are reluctant to pass over some of the glaring misstatements and the erroneous theories of counsel. We are in a quandary as to whether or not any further briefs in this matter will add sufficiently to what has already been said to offset the additional labor entailed in reading even a few pages.

While we considered it advisable to file separate briefs originally, all of the appellees prefer to join in this reply, to save the court from possible reiteration and the necessity of devoting too much time to reading our arguments. Our original briefs were filed separately, not only to give the court the advantage of any possible difference of approach to the problem, but also because there was some conflict of interest in respect to technical defenses raised under the terms of the various policies. There has never been any difference among the appellees as to the funda-

mental issues of fraud and false swearing on the part of appellant.

As we have pointed out, in reference to the various claims of error urged by appellant, the best that can be said in his favor is that there is some conflict in the evidence. Any apparent conflict is created, either by the testimony of parties employed and paid by appellant or by the rebuttal testimony of appellant and his too willing employees and supporters, Miss Mitchell and Taylor. Where there is an actual conflict, it has been resolved against appellant by the Chancellor. The decisions are uniformly against appellant's effort to set aside this decision, and this court is so familiar with these authorities that we shall quote from only two. The first of these decisions is the latest expression of a Circuit Court of Appeals, the second is a recent expression of the rule by this court:

> " 'It has long been established by this and other federal courts that the findings of a chancellor on conflicting testimony are presumptively correct, and will not be overthrown, unless it is clear that some serious mistake has been made in consideration of the evidence. Tilghman v. Proctor, 125 U. S. 136, 149, 8 S. Ct. 894, 31 L. Ed. 664; Karn v. Andresen, 60 F. (2d) 427, 429 (C. C. A. 8); Central Republic Bank & Trust Co. v. Caldwell, 58 F. (2d) 721, 734 (C. C. A. 8; Coats v. Barton, 25 F. (2d) 813, 815 (C. C. A. 8).' Norwich Union Indemnity Co. v. Simonds (C. C. A. 8), 65 F. (2d) 134, 135; Klaber v. Lakenan (C. C. A. 8), 64 F. (2d) 86, 90 A. L. R. 783; Woods-Faulkner & Co. v. Michelson (C. C. A. 8), 63 F.

(2d) 569; Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland (C. C. A. 8), 63 F. (2d) 833; Clements v. Coppin (C. C. A. 9), 61 F. (2d) 552."

Bourjois, Inc. v. Park Drug Co., 82 F. (2d) 468.

"It is well settled that the findings of the trial court, based on conflicting testimony taken in open court, will not be disturbed on appeal. John T. Porter Co. v. Java Cocoanut Oil Co. (C. C. A.), 4 F. (2d) 476 (certiorari denied, 268 U. S. 697, 45 S. Ct. 515, 69 L. Ed. 1163); Gila Water Co. v. International Finance Co. (C. C. A.), 13 F. (2d) 1; United States v. United Shoe Mach. Co., 247 U. S. 32, 41, 38 S. Ct. 473, 476, 62 L. Ed. 968, in which the Supreme Court said: 'The testimony was conflicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge of witnesses from their reported words as against their living presence, the advantage which the trial court had'."

Clements v. Coppin, 61 F. (2d) 552.

While we believe that this rule definitely disposes of this appeal, we shall briefly discuss some of the points raised in the reply brief.

AS TO APPELLANT'S ARGUMENT AS TO INCENDIARISM.

Counsel are either laboring under a most serious misunderstanding, or are deliberately trying to cloud the issues in the following respects:

First, this is not a criminal trial;

Second, the mere fact that there is conflicting evidence is not sufficient to justify a reversal;

Third, even granting (without conceding) that there were errors in the admission of testimony, such errors will not aid appellant in an equity appeal;

Fourth, that this action, and the defenses to it, are based solely and only on written contracts of insurance, and the violation by the insured of certain of the terms and conditions contained therein.

Counsel state:

> "It is inconceivable that appellees could believe that the insinuations made in the oral argument are sufficient to convict the appellant of incendiarism." (Br. p. 2.)

It is perhaps fortunate for appellant that it is not necessary to argue this phase of the question. We are concerned, not with the question of reasonable doubt, but rather with whether or not there is any evidence to support the findings of the Chancellor. While it is tacitly (if not openly) admitted throughout the brief—and indeed such an admission is unavoidable—that this fire was incendiary, counsel assume the perhaps unnecessary burden of trying to prove, by argument, that appellant did not set the fire. In this respect it is pointed out that the testimony (of ap-

pellant and his employee, Miss Mitchell) shows that he was not the last person in the *"factory"*, that as a matter of fact Miss Mitchell was. This limited term is used to indicate not the building where the fire occurred, but merely the upper floors. It is pointed out that Miss Mitchell went upstairs and locked all the windows, while appellant remained on the first floor. It will be remembered that after this was done, they locked the doors and left together. It is pointed out that kerosene was habitually kept in this building—but there is no mention of the fact that it was kept *in a tank, in the basement.* (Tr. Vol. II, p. 566.) On the night of the fire we find it on all floors, including the first (where it was used so freely that it leaked through onto merchandise in the basement), where one of the fires was started. We find it on all the upper floors—in drums which have had spikes driven into them, to permit the free flow of the liquid, in pans, on the stairs and floors, and on the merchandise. (See —"As to the Nature of the Fire", brief of Western Insurance Company, pp. 9-13.) But the doors and windows are still in the condition in which they were left by appellant and Miss Mitchell—*locked.*

It is stated that appellant would have lost and could not have profited by a fire. This statement is merely one of counsel, who apparently have been unable to answer our showing that as a matter of fact appellant would have made a profit of at least $250,000 had this fire totally destroyed this building and its contents. (See—"As to the Insurance Carried by Appellant"—brief of Western Insurance Company, pp. 7-8.)

It is stated that appellant had a prosperous business and that he would have been crazy to have a fire. True, the figures that are quoted look most imposing, but we find that appellant had considerable money tied up in stock and machinery, and that there had been additional merchandise ordered months before, on *genuine* contracts. We find that the market was falling, the only definite percentage being 16% from October, 1929, until April, 1930. This decrease was on merchandise which had already sustained a substantial drop in price. *We find that before the fire he was selling finished lined bags for $30 a thousand less than his claimed cost for the same bags, unfinished and unlined.* (Tr. Vol. III, p. 1628.) He was also contemplating selling this business, and did so after the fire. Under the circumstances it would not appear so crazy to sell the stock and machinery to the insurance companies and in addition to try for a profit of $250,000. We know that this appellant did not balk at other forms of fraud.

AS TO THE MODEL OF THE SECOND FLOOR.

Counsel say they are glad that we brought this matter up on oral argument. It is also stated:

> "We may conclude this matter by stating that appellees have not had the temerity to present this matter at all in their briefs, where its weakness would be readily apparent; but they attempted to present it only on oral argument to give the court an erroneous first impression in its consideration of this case." (Br. p. 9.)

This is a good example of the reliance which can be placed upon statements contained in the briefs or in the oral argument. We shall quote from the brief of two of the appellees:

> "We made a demonstration relative to Mr. Hyland's contention concerning the stock on the second floor. In demonstrating his contention we had an extra model of this floor eliminating all machinery and anything else that would necessitate a deduction from the amount of floor space. We placed 150 bales on this second floor. These 150 bales more than covered the entire area, including that which we know was occupied by machines.
> * * *
>
> Perhaps an even better illustration would be in line with our Exhibit JJJ. This was the exhibit representing the second floor in accordance with Mr. Hyland's testimony as to its contents. While we do not know whether or not the models representing merchandise are still in position in this model of the second floor, we have in evidence photographs showing the result of attempting to place this merchandise on that floor. An examination of these photographs will show the court that it not only blocked all doors and windows, covered all space occupied by machinery, but it projected above the height of the walls. 2000 bales of burlap would have filled two floors to the same extent after removing all machinery and the stock which was later found in the building and inventoried. These illustrations will probably give the court a better idea of the meaning of this claim relative to debris." (Appellee's Br. pp. 84-85.)

Appellant naturally did not include these exhibits in those which he desired to present to this court, but we insisted on bringing them up.

Counsel refer to, quote a portion of, and attempt to explain a portion of the testimony of appellant because of which this exhibit was made. We shall quote it in full:

> "On Monday, June 21, 1930, at the office of McLaren, Goode & Co., in this city, at an arbitration proceeding on Use and Occupancy insurance, the following is a correct reading of my testimony as reported in Volume 2, page 231, of the transcript in that proceeding:
>
> 'Q. You also had material on the other floors, did you not?
>
> A. Now, we will come to the second floor. We had probably a half million bags piled in the north end of that building, all loose, ready for turning, and we had probably two or three hundred thousand yards of baled burlap which had not been opened, and we had probably 100,000 to 150,000 yards of burlap and cotton sheeting—I will change that statement, if I may; we had 200,000 to 300,000 yards of burlap and cotton sheeting which had been opened, the ends of the bolts sewed and ready to go through the sewing machine, all on that floor, and we also had probably twenty rolls of burlap which had been rolled and ready to be processed through the printing houses. That floor was quite well filled with merchandise.' "
>
> (Rep. Tr. Vol. I, p. 488.)

This court has seen the model and the photographs which show the conditions which would have existed, if appellant's testimony could be believed.

Even if we had not discussed this exhibit in our briefs or on oral argument, it is discussed in the opinion of the trial court:

"To contradict this testimony, plaintiff was confronted with his testimony at the U. & O. hearing, which was an arbitration proceeding involving other policies on which there had been a loss due to the same fire. He had there testified with some particularity that prior to the fire the second floor was filled with merchandise and in general described the quantity and type. In the course of his cross-examination he in effect adopted the testimony given at that hearing."

(Rep. Tr. Vol. I, p. 194.)

"The quantities of merchandise which plaintiff testified were on the second floor of the factory at the U. & O. hearing were greatly exaggerated. Defendants have prepared an exhibit to demonstrate the physical impossibility of the truth of this testimony. It would fill the floor with stock to the height of the ceiling and above, leaving no room for aisles and the machinery on the floor and for the employees to move about at their work. This is not such an overvaluation as might result from an honest mistake. Plaintiff as an expert in the burlap business knew the space which quantities of burlap occupy and also knew the capacity of his own factory. Counsel for plaintiff argues that the U. & O. testimony is not a definite statement but is merely an approximation of the quantities. Unless one is testifying from a computation all estimates of quantity are but approximations, but the one in question is so far removed from the possible contents that it is incredible that a man in plaintiff's position should have offered it in good faith."

(Rep. Tr. Vol. I, pp. 195, 196.)

The trial judge *heard* this testimony and *observed* appellant while he was being examined. Yet counsel, who did not have this opportunity, now try to strain, distort and explain this testimony. It has taken over four years after the trial to work out this explanation. It has taken that period of time, and the death of the judge, to attack the attitude of that judge and his alleged bias against appellant. We all knew that judge, his tolerance and his "reluctance" to find any man guilty of wilful and deliberate fraud, false swearing and perjury. And yet, in their desperation and desire to procure some money for such a man, they do not hesitate to attack that judge. We say that no man could have heard the testimony and observed the witnesses on that trial without arriving at the same conclusion.

AS TO DEBRIS.

At the trial it was insisted that there were 100 tons of this remains of merchandise. This was a little too much for present counsel, so in the opening brief they reduce this to 70 to 80 tons. We treated this at length in the briefs of Millers National and Western Insurance Companies under the heading "As to Appellant's Evidence as to the Amount of Loss or Damage". (pp. 82-85.)

Counsel realize the absurdity of their claims in regard to this item and the question of merchandise "obliterated". They cannot answer our figures showing this. Therefore they state our treatment of this subject is ridiculous, *as they do not claim it was* ALL

merchandise. This and their "contemptible" arguments remind us of the small boy, whose retort is "you're another".

What portion of this alleged 70 or 80 or 100 tons do they claim represents merchandise "obliterated", "totally destroyed" or "burned out of sight"? What type of merchandise did it represent?

We desire this court to realize that throughout the adjustment and the trial, and in our arguments and briefs, we challenged proof, *or argument,* showing what appellant claims this merchandise was. There has never been one word to explain this—except a claim of $15,713.12 in the proofs of loss, later boosted to $46,139.46, supposedly based on the figures of Hood & Strong.

These accountants obligingly tried to explain it by preparing a "yardage and poundage" report. (Exhibit 30, Tr. p. 288.) In this they arrive at the astonishing result *that appellant should have had* 494,000 yards of material (of a value of $39,638.02) *which he admittedly never had.* This material and this value (neither of which existed) were, and must be, included in order to arrive at the value of the stock claimed by appellant. This material is set up as 37/10 burlap, and yet the physical inventory taken at Sacramento Street on September 30, 1929, shows that *there was no burlap of this grade at the plant.* (Exhibit 98, Vol. III, p. 1397.) The uncontradicted testimony of Rickards shows that no such material was received subsequent to September 30. (Vol. III, p. 1219.) As a matter of fact, the only material of this kind consisted of twenty-five

bales at Sansome Street, and it was still there after the fire. (Exhibit 82, Vol. III, p. 1302 and Exhibit I, Vol. III, p. 1355.)

In their desperation counsel grasp at a straw and claim that the trial court found there was merchandise burned out of sight. They base this on:

> "I believe that some of the stock was burned out of sight but that the amount was small. *If it were necessary to determine the amount of the out of sight loss, I should find that it was* the difference between the perpetual inventory kept by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, *or approximately the sum of $2,000.*
> * * * * * * *
>
> The strongest evidence introduced in behalf of plaintiff's contention that great quantities of stock were obliterated, aside from the testimony of the accountants, was the testimony as to the debris. As to the quantity and character of the debris there is serious conflict of testimony. In the light of the evidence which I have just discussed it is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition."
>
> (Rep. Tr. Vol. I, p. 185.)

> "Not only does the proof show negatively that there was no substantial quantity of merchandise obliterated by the fire, but it shows affirmatively that the amounts claimed were fraudulently built up."
>
> (Rep. Tr. Vol. I, p. 186.)

> "As further evidence that there was little or no merchandise burned out of sight, the count of the

bags in process of manufacture is important. The records of the company show 190,571 bags in process on the night of the fire. Radford's count showed 189,392 identifiable after the fire, a loss of less than 1%."

(Rep. Tr. Vol. I, p. 187.)

Isn't this a pitiful showing on which to expect this court to reverse this case and find that there was $46,-139.46 worth of merchandise totally destroyed? Yet on such argument, with no testimony to support it, counsel ask this court to discredit the findings of a judge who saw the witnesses, the building where the fire occurred, the machinery involved in the fire, and heard all the testimony. This is the net result of four years of effort since the trial. As against this we have the positive testimony of witnesses, as shown in our earlier briefs under this heading.

AS TO DAMAGE.

This is fully discussed by us in the briefs of Millers National and Western Insurance Companies under the heading "As to the Evidence of Actual Damage to the Merchandise". (pp. 102-109.) No evidence was introduced on the trial by appellant, except the reports of accountants, purporting to show what *should* have been in the building. We introduced positive, not speculative evidence as counsel contend, through disinterested witnesses, that not over 25% of the merchandise was damaged. We also introduced positive evidence that the amount of damage was actually about $10,000.

There is no attempt to answer this except to refer to the "opinion" of Sugarman as to the percentage of damage. It will be remembered that this party was employed by appellant, that he was called as a witness and gave no testimony which would support such an opinion. It will also be remembered that his compensation was to be based on a percentage of any amount recovered, and that it was to his advantage to endeavor to claim and recover for damage which did not exist.

> "I had a sliding scale agreement with Mr. Hyland as to my compensation for handling this loss. That varied from 3 to 6 per cent. Well, I would not say definitely as to whether that was to be left to Mr. Hyland to determine, the amount he was to pay me. There was a kind of an understanding that it would be determined by the amount of work involved, that we would decide it between us. No, sir, there was not any agreement that I was not to be paid in the event of litigation. I am positive of that."
>
> (Rep. Tr. Vol. II, p. 1004.)

> "Answering your question 'Was the percentage of your compensation to be determined in any way by the amount of recovery from the companies?' at the time we discussed that we had no idea of a lawsuit. If I recovered a larger amount—not referring now to litigation—my percentage would be larger. Answering your question 'So it was to your advantage to boost the amount of loss?' it would have reacted to my advantage."
>
> (Rep. Tr. Vol. II, p. 1008.)

In the briefs of Western and Millers National Insurance Companies (pp. 76-88), we have discussed at

length appellant's evidence as to the amount of loss or damage. In the same briefs (on pp. 102-108), we have shown the evidence of the actual damage to the merchandise. Counsel has attempted to answer this by stating that plaintiff "believed material was burned up in the fire" (Br. p. 81), and that the court must have refused to believe the witnesses for the insurance companies because the court found that there was out of sight loss. They attempt to show that the actual damage sustained was determined by the auction sale. (Br. p. 84.) We have discussed the question of this auction sale at length in the briefs of Western and Millers National Insurance Companies. (pp. 134-139.)

It is interesting to note that during the trial there was no attempt to show the court what merchandise was damaged or destroyed, except Mr. Sugarman's "guess" (as counsel label it) as to the percentage of damage. There is nothing in appellant's opening brief, and, although we have challenged their argument, *there is not a single word in the reply brief which would enable this court to determine what, if any, merchandise was "damaged", "obliterated" or "burned out of sight".*

AS TO THE RADFORD GRADING.

The arguments of counsel in this respect show how desperate they consider their case, and how versatile they are in changing their position when they cannot answer our arguments. In their opening brief they made a statement which was one of the few with which we could concur:

"Radford took the inventory of the salvaged merchandise. (Vol. V, pp. 2503-2504.) After the merchandise had been piled in the building he was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (Vol. V, p. 2525.) He was given the assistance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (Vol. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (Vol. V, p. 2528.) *He took the word of Mr. Kraus as to the amount and grade of each lot of burlap.* (Vol. V, pp. 2588, 2591.) (Appellant's Br. p. 84.)"

(Appellee's Br. pp. 91-92.)

In order to show how much reliance the court can place upon statements made by counsel for appellant, we quote from their reply brief, pages 81 and 98:

"Pages 88-102. Any over-grading or over-pricing of merchandise on the Radford inventory was to the benefit of appellees and could not, even if knowingly done, constitute false swearing. (There is nothing in the evidence to indicate that any over-grading was other than merely a mistake, perhaps Radford's the employee of appellees; or that any over-pricing was other than by mistake or in accordance with an understanding between Sugarman, appellant's adjuster, and Smith, adjuster for some of appellees.)"

"In this matter, we are beginning to suspect that there was a 'nigger in the woodpile', and that possibly Radford planted this misgrading in an effort to entrap appellant. We are certain that

> counsel for appellees was aware of the error in grading some of the merchandise when he cross-examined Gus Kraus (Vol. II, pp. 794-795), the man who assisted Radford in the grading, and we are likewise certain from reading the same testimony that Mr. Kraus was absolutely unaware of the fact that any error had been committed. Radford was Smith's man. *Any misgrading might have been a clever idea of Mr. Smith.*"

It will be noted that such statements and insinuations are not supported by one word of evidence. We covered this matter very thoroughly in the briefs of the Western and Millers National Insurance Companies. (pp. 88-102.) In fact, they were so thoroughly covered that counsel has been absolutely unable to answer the testimony or our argument except by these statements.

In addition they have adopted the absurd statement of Sugarman in an attempt to show that by fraudulently raising grades and prices, and attempting to collect a larger amount, they have actually benefited the insurance companies. On pages 109 to 122 we have discussed the question of the pricing of this inventory. Counsel again have not been able to meet either the testimony or the argument and content themselves with referring again to Sugarman's argument that this could not be harmful to appellees and that there is no evidence to show that the increase in price and grade was intentional or fraudulent. This is despite the fact that we have pointed out that Hyland testified that he knew the figures to be correct, that he was familiar with values, that the values on the proofs of loss rep-

resented landed costs. This is also despite the fact that Mr. Smith testified that Hyland told him that these figures were 100% right and that Smith warned him that he would vitiate his contracts of insurance by insisting upon proceeding along this line. We ask the court particularly to refer to the comparison of values set up in the tables on pages 122 and 123. (Brief of Western Insurance Co.) The trial court grasped this situation and has set it forth very clearly and briefly:

> "The fraudulent padding commenced with the pricing and grading of this inventory. Since plaintiff was claiming, as the measure of his damages on the salvaged stock, the difference between the value of this inventory and the proceeds of the auction sale, it was to his interest to have the valuation as high as possible. Radford was not a burlap man and had one of plaintiff's employees give him the grades of the stock. Taylor, who priced the inventory, admitted on cross-examination that he knew that the grades were raised and that there was no such quantity of certain high grades of burlap in the factory at the time, and that the mistake in grading added some $6,000 to the values. He said he merely priced the grades the inventory called for. Hyland and Taylor were familiar with the grades in the factory, for Hyland did the purchasing and Taylor kept the books, and the evidence shows that Radford was either deliberately misled as to grades or that the mistake was permitted to remain with full knowledge that it was there.
>
> There was a deliberate deception as to price. The inventory was priced according to the Bemis so-called large quantity price list. This was actu-

ally a retail price list for use by the Bemis Company's salesmen. Plaintiff was not entitled to recover the retail price of the damaged stock. He was entitled to recover its replacement cost as of the time of the fire which he, as a large purchaser could procure. Not only did plaintiff use the retail price but he attempted to suppress quotations as to price from other dealers and succeeded in suppressing them and withheld information as to his own costs. Furthermore to this retail price was added a half a cent a yard to cover cable tolls, and other expenses which might have been properly added to a landed cost but obviously not to a retail price. As a matter of fact, plaintiff first testified that the inventory had been priced at landed cost but admitted under cross-examination that this Bemis price list was used. Plaintiff's adjuster testified that the matter of replacement values was left to plaintiff who was, according to his own testimony and that of others, a shrewd buyer and knew burlap prices thoroughly. He nevertheless used a price from two to four cents a yard higher than the prices at which he could have replaced his materials."

(Rep. Tr. Vol. I, pp. 188, 189.)

AS TO DUPLICATION OF PURCHASES.

This matter was discussed at length on pages 46-76 of the briefs of the Millers National and Western Insurance Companies. The trial court found:

"Defendant has established that at least $41,-361.12 should be deducted from the values claimed because of duplications. I shall discuss two of these duplications because they illustrate the

fraudulent manipulation of records by plaintiff and also show the significance of the employment of a different firm of accounts to build up values on the basis of the Ernst & Ernst inventory. A certain numbered stock sheet was given Hood & Strong representing a purchase of burlap from H. M. Newhall & Co. for $22,737 which arrived on the 'Silver Elm' as a purchase subsequent to the Ernst & Ernst inventory. The stock sheet was originally dated in May 1929; the May was crossed out and June written in above. It was contended that this material had not been counted by Rosslow who prepared the Ernst & Ernst inventory because it was on the dock at the time. The work sheets of Rosslow show that the full value of this was taken into account and included in his total. His work sheet gives the very number of the stock sheet, mentions that it is a Newhall contract and that it is recorded but not inventoried. The other duplication which I shall discuss is of a purchase of fifty bales of burlap. This is shown by a stock sheet apparently dated June 20, 1929. However, it is also numbered and the numbers on either side show merchandise received in April. There is an erasure under the month and on inspection it shows that April has been erased and June typed over it. The explanation offered that both these lots of burlap were being held for Newhall Co. is unsupported by the Newhall records and is entirely unconvincing."

(Rep. Tr. Vol. I, pp. 191-193.)

This is one of the major items considered in the reply brief of appellant. We wish that this court would examine this argument and then read our argument in connection with these various items, having the original exhibits before them.

It will be noted that the court found, and that it is virtually admitted by appellant (in fact, it cannot be denied), that there was a duplication of $22,737.12. Counsel attempt to disprove the other items. This attempt is based on the testimony of Taylor and Miss Mitchell when called on rebuttal. The trial court had this testimony in mind when the judge stated "The explanation offered that both these lots of burlap were being held for Newhall Co. is unsupported by the Newhall Co. records and is entirely unconvincing." (Rep. Tr. Vol. I, pp. 192-193.) Here again we have an apparent, not a real, conflict which has been resolved against appellant by the trial court.

In connection with Taylor's testimony it appears that he took an actual physical inventory at the Sansome Street warehouse on October 21, 1929, and found 68,000 grain bags listed under lot 521, which was the designation for manufactured bags for the year 1928. Taylor admits this fact, and that also on the top of the third page of this inventory there appears a notation in pencil, in his own handwriting, "1928 remainder". This inventory was taken, and this notation made, immediately following the fire, in the course of Mr. Taylor's duties, and at a time when he, as an employee of appellant, was anxious to definitely and correctly establish the merchandise remaining on hand. Later, on cross-examination, he states that he was mistaken in making this entry, that, as a matter of fact, this represented bales of burlap. Later, on rebuttal, and after he had heard the testimony produced by appellees, and after he had been forced to admit changes in the records made by him, which he could

not explain, and after his attention was called to the testimony of Mr. Hart, and an explanation he had given relative to this 68,000 grain bags, Taylor, in a desperate attempt to save appellant, brought forth the explanation upon which counsel now attempt to rely, an explanation which he admitted he based only on "reasoning". Miss Mitchell, of course, attempted to corroborate him, and the court rejected the testimony of both of them.

This is the same Taylor who was acting as warehouseman and who issued warehouse certificates to cover loans, showing that these loans were secured by merchandise in the warehouse when, as a matter of fact, the records of the Hyland Bag Company kept by Taylor showed that there was no such merchandise. We shall not quote the testimony showing this, although we examined him at some length relative to some of these receipts. (Tr. pp. 1574-1578.)

This man could not give us any explanation for changes in the stock sheets made by him, but he has given us three different explanations, trying to show fifteen months later that the original entry as to this item, made in his own handwriting, was erroneous, basing this explanation purely upon reasoning. It is no wonder that the court rejected such testimony.

It is also to be noted that counsel carefully avoid any reference to Hood & Strong's "yardage and poundage" report. (Exhibit 30, Vol. I, p. 288, and as amended, Exhibit 101, Vol. III, p. 1425.) This is not to be wondered at when we realize that included in the purported value shown by Hood & Strong there is

included 494,000 yards of 37/10 burlap supposedly at Sacramento Street, of a supposed value of $39,683.02, when the records of Hyland show that as a matter of fact there was no such burlap at the plant, and that there was only 50,000 yards out of a total built up yardage of 633,968 yards at the warehouse.

AS TO THE NEWHALL "FICTITIOUS CONTRACTS".

This was rather carefully covered in briefs of Millers National and Western Insurance Companies. (pp. 123-130.) The best that can be said in appellant's favor in respect to these contracts is that there was an apparent conflict between the evidence brought out on cross-examination of Colbert and the attempted rebuttal by appellant and the ever ready and willing Miss Mitchell. The trial court resolved this conflict against appellant and stated "I believe Colbert's testimony as to this contract". (Tr. p. 200.) Counsel attempt to argue that these contracts were genuine because appellant, to protect himself, wrote a letter under date of October 22nd, referring to these fictitious contracts and incorporating a reference to ten genuine contracts. This letter was handed to Colbert and by him destroyed. It never found its way into the Newhall records. It is also interesting to note that the correspondence *from* Newhall (Exhibit 130, Vol. IV, p. 1776, Exhibit 121, Vol. IV, p. 1785) which was received, and produced, by appellant, sets forth in detail all of the genuine contracts, but the fictitious contracts do not appear.

Even the manufactured evidence of the letter written by Hyland states that they desire to retain the genuine contracts. As a matter of fact, appellant later received—and eventually paid for—the merchandise covered by the genuine contracts.

Why, if these contracts were genuine, were they not produced at the trial, where their production was constantly demanded? Why have they not been found during the more than four years which have elapsed since the trial, and why were they not produced before this court with the request that it determine that there were actually such contracts, and that they were genuine?

Under the law of this state it is presumed that where a party conceals or fails to produce evidence which is available it must be presumed that it would be detrimental to him if produced. It is also a well established rule of law that where a party fabricates or manufactures evidence, testimony produced by him must be viewed with suspicion.

> "The fabrication of testimony is always a badge of weakness in a case, and when clearly established justifies a conclusion of fraud in the entire case. Allen v. United States, 164 U. S. 492, 499, 500, 17 S. Ct. 154, 41 L. Ed. 528; McHugh v. McHugh, 186 Pa. 197, 40 A. 410, 41 L. R. A. 805, 65 Am. St. Rep. 849; Nowack v. Metropolitan St. Ry., 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691; B. & O. R. Co. v. Rambo (C. C. A.), 59 F. 75."
>
> *Gung You v. Nagle,* 34 F. (2d) 848 (C. C. A. 9).

AS TO FRAUD AND FALSE SWEARING.

We must admit that it is extremely difficult for us to follow the logic of the argument advanced in this brief. On page 78 it is stated:

> "The maxims 'He who seeks equity must do equity' and 'he who seeks equity must come with clean hands', have no application against appellant in this case."

Counsel also argue and cite cases to support the claim that perjury committed during the trial would in no way affect the right of appellant to recover. One of these cases we have been unable to find due to the fact that the citation is apparently erroneous. Of course, it is a matter of common knowledge that we can find decisions of some court on any side of any subject. Such decisions are clearly against the weight of authority and are absolutely opposed to all of the Federal decisions. In addition it is inconceivable that an equity court would permit recovery by a plaintiff admittedly guilty of perjury in an attempt to establish the amount of his claim. This entire argument of counsel is directed to the fact that the provisions of the policy refer only to the proof of loss, yet the conditions of the policies under consideration vary from those involved in the cases cited by counsel for appellant in that they provide that the entire policy shall be void "in case of *any* fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof *whether before or after a loss*". But, strange as it may seem, counsel are not content with such an argument.

Despite the fact that the provisions of the policy, which are statutory and adopted by the legislature of this state as the only form of insurance that can be written, provide that any false swearing voids the policy, counsel set forth one of the weirdest arguments which it has ever been our pleasure to read:

> "In another view of this case it may even be said that the *provision in these policies of insurance for forfeiture for fraud and false swearing have no application to proofs of loss,* but that any false swearing to be a ground of forfeiture must be in reference to some matter entering into or pertaining to the contract of insurance itself. In this regard the view is that upon the occurrence of a loss, the right of the insured becomes vested, and his rights in California cannot be forfeited for any statements thereafter pertaining to the loss. None of the higher courts of California have passed on this question, but so far as we have been able to ascertain it has not been necessary for them to do so. We do not believe there is any case in California reports where the insured has been deprived of his insurance by false swearing as to his loss.
>
> The provisions in the policies in the case at bar cover false swearing relating to the insurance or the subject thereof. *A reasonable construction is that the fraud or false swearing, though it may be done after the loss, must concern the insurance or the insured* PROPERTY BEFORE THE LOSS. Nothing is said about a false claim or proof of loss."
>
> (Br. pp. 73-74.)

Naturally there are no authorities cited to support such a contention and we can rest assured that no court would enunciate such a principle, otherwise counsel, who have shown themselves to be indefatigable in their zealous search of any wording of any decision which might in any way support their contentions, would have produced any decision which had the slightest leaning toward such an argument.

As directly opposed to this argument this matter has been squarely passed upon by our District Court of Appeal in a case in which a hearing was denied by the Supreme Court. It is stated:

> "Under the provisions of the policy in the present case, wilful destruction of the property on the part of the insured, or *wilful and false statements made by him on his proof of loss with intent to defraud the insurance company, will totally avoid the policy and relieve the insurer from all liability thereunder.* (Pedrotti v. American Nat. Fire Ins. Co., 90 Cal. App. 668 (266 Pac. 376); 33 C. J. 19, sec. 667; 6 Cooley's Briefs on Insurance, p. 4938; 7 Cooley's Briefs on Insurance, p. 5858.)" (Italics ours.)
>
> *Singleton v. Hartford Fire Ins. Co.,* 105 Cal. App. 320.

We have already pointed out that the Supreme Court of the United States, and the various Circuit Courts of Appeals have uniformly reached the same decision.

It is not our intention to burden this court with a detailed discussion of the fraudulent claims set forth in the proof of loss. To very briefly point out a few

of these, it appears that the increase in the grading of the burlap from 36-8 to 36-9 and 40-8 to 40-10 added a total of $6175.06. In addition, the increase in unit cost as claimed in the proof of loss involves an increase of over $20,000 in values as compared with actual values. This is clearly set forth in the recapitulation of Defendant's Exhibit UUU. (Rep. Tr. Vol. V, p. 2723.) In this connection it will be remembered that R. V. Smith testified that the unit costs used by him were high, but even using these unit costs we find that the padding of this proof of loss by fraudulently increasing grades and prices results in an increased claim of value of this merchandise amounting to $26,365.32 out of a total claim of $73,000. In addition to this, we find that there has been a claim on each of the items enumerated in the proof of loss varying from 25 to 90%, whereas as a matter of fact the positive testimony of numerous witnesses shows that not to exceed 25% of the stock was actually damaged. We have already pointed out that there is no attempt to attack the figures of the adjuster, Smith, showing that as a matter of fact the actual loss sustained by reason of this fire amounted to only $10,000 instead of the $73,000 originally claimed by appellant.

In this connection it is sufficient to call the attention of the court to the fact that the trial court found:

> *"The false swearing in the proof of loss is, however, sufficient in itself to defeat recovery and the fraud in connection with the other claims of loss and the testimony of the plaintiff at the trial*

> *are merely cumulative in their effect.* In considering this defense it must be remembered that this is a suit in equity with its historic requirement that he who seeks equitable relief must come into court with clean hands."
>
> (Rep. Tr. Vol. I, p. 181.)

Upon the petition for rehearing which was based largely on the ground the court had failed to find that the fraud and false swearing was wilful and intentional, the court stated:

> "In the light of the argument upon the motion for new trial, there are two points in my opinion which I wish to clarify. * * * Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss."
>
> (Rep. Tr. Vol. I, p. 232.)

Appellant cites the case of *Young v. California Ins. Co.,* 46 Pac. (2d) 718 (App. Reply Br. pp. 76-77), to the effect that the companies waived fraud and false swearing in the proofs of loss because they did not then object to it. It is an inherent quality of fraud that the parties on whom it is being practiced do not know about it, and if they do not know the fraud it is obvious that they cannot object to it. This has always been recognized in all branches of law. For instance, the statute of limitations does not run against fraud until it is discovered. The *Young* case cited by appellant is therefore not sound law generally, but it especially is inapplicable in Cali-

fornia because it is based upon a different policy than the California standard form. In the California standard form policy there is the following provision:

> "Nonwaiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assent to the amount of the loss or damage or by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."
>
> (Rep. Tr. Vol. I, pp. 313, 314.)

Not only does the *Young* case admit that the court is "not unmindful of the fact that there are respectable authorities holding" to the contrary of that opinion, but it is admitted in that opinion that there is a particular exception under two instances as follows:

> "In order to constitute a waiver in such cases, however, it must appear that the company had knowledge of such defenses at the time of requiring the additional proof. And the parties may validly contract that a demand for proofs or for additional proofs shall not effect a waiver and, where it is so provided, calling for additional proofs does not waive a defense of delay or misrepresentation."

This latter specific provision is in the California standard form policy.

The same statement is found in 7 *Couch Cyc. of Insurance Law,* Sec. 1596, p. 1597.

Appellant further cites the cases of *Goldberg v. Provident Washington Ins. Co.,* 87 S. E. 1077-1079 (Ga.); *Dietz v. Providence Washington Ins. Co.,* 11

S. E. 50, 58; *Third Natl. Bank v. Yorkshire Ins. Co.*, 268 S. W. 445, 449, as authority to the effect that a plaintiff does not forfeit his right to recover under a policy for fraud and false swearing after the loss. These cases are isolated cases and are directly contrary to the rule established in the federal courts. In addition to the authorities heretofore cited in our briefs, and also in the opinion of the trial court, we refer the court to 26 *C. J.*, page 382, for the general rule upon the subject as follows:

> "There is usually a provision in policies of fire insurance that any fraud or false swearing by insured relating to the loss, or in the proofs of loss, will forfeit any right of recovery under the policy. Such a provision is valid and enforceable. (Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76; Perry v. London Assur. Corp., 167 Fed. 902, 93 C. C. A. 302; Weide v. Germania Ins. Co., 29 F. Cas. No. 17,358, 1 Dill. 441; Huchberger v. Merchants' F. Ins. Co., 12 F. Cas. No. 6,822, 4 Biss. 265; Geib v. International Ins. Co., 10 F. Cas. No. 5,298, 1 Dill. 443), and in order to defend on this ground the insurer is not required to tender back to insured the premium which he has paid. (American Ins. Co. v. Paggett (Ind. A.), 128 N. E. 468.) Accordingly a fraudulent overvaluation in the proofs or statements of loss will defeat recovery under the policy (Geib v. International Ins. Co., 10 F. Cas. No. 5,298, 1 Dill. 433; Howell v. Hartford F. Ins. Co., 12 F. Cas. No. 5,780; Huchberger v. Home F. Ins. Co., 12 F. Cas. No. 6,821, 5 Biss. 106; Sibley v. St. Paul F. & M. Ins. Co., 22 F. Cas. No. 12,830, 9 Biss. 31)."

The claim of appellant that he is free to make use of the processes of the court to file a false and fraudulent claim, and to ask the intervention of equity on his behalf, while he is attempting to deceive the court with false and perjured testimony, is so utterly ridiculous as hardly to call for any answer. The State of California is just as much interested in fraud committed in preparing the proofs as it is in the preparation of the contract, and it is just as much concerned with fraud or false swearing as the basis of a suit filed under the policy—in fact, more so—as it is if such was made in the proof of loss. The matter is well summed up in the case of

Mazzella v. Hanover Fire Ins. Co., 174 S. E. 521,

where the plaintiff contended that he could not be defeated in his action for a false and fraudulent claim in court because the claim as finally proved was more than the face of the policy, but the court said:

> "This reasoning will not do. The excessive figure was obviously intended for its effect in recovering the amount of the policy first by negotiation with the company, and failing in that, by jury trial. We cannot avoid the conclusion that this claim was intentionally excessive and that as such it voids the policy."

We specially call the *Mazzella* case to the attention of this court because its facts almost exactly parallel the facts of this case. The fire was a set fire, and while Mazzella proved that he was not present at the time the fire started but was visiting a sister in another town, the court makes this statement:

> "The proof does not connect Mazzella with the origin of the policy in a manner sufficient to serve the defendants beyond furnishing a strong background for the charge of false swearing."

For the same reason, like facts were shown and admitted into the record by the trial court in the instant case.

As said by the United States Supreme Court in *Claflin v. Commonwealth Ins. Co.,* 110 U. S. 81, 28 L. Ed. 76,

where the claimant testified falsely *at the trial:*

> "A false answer as to any matter of fact material to the inquiry knowingly and wilfully made with intent to deceive the insurer would be fraudulent. If it accomplished this result, it would be a fraud effected; if it failed, it would be a fraud attempted. * * * No one can be permitted to say in respect to his own statements upon a material matter, that he did not expect to be believed. * * * False statements wilfully made under oath intended to conceal the truth on these points constitute an attempted fraud by false swearing which was a breach of the conditions of the policy and constituted a bar to the recovery of the insurance."

This vigorous statement by our Supreme Court is all the answer that is needed to the claim of plaintiff that he is "at liberty" to bring a false and fraudulent claim into court and to swear falsely in support of it without voiding his policy.

THE FAILURE TO SECURE AN APPRAISAL WAS ATTRIBUTABLE TO THE INSURED HYLAND AND TO HIS APPRAISER, COLBERT, AND THEREFORE APPELLANT COULD NOT MAINTAIN A SUIT ON THE POLICY.

The legislature has established by law the California standard form policy. In this form it adopted as the public policy of the State of California the principle of arbitration by an appraisal of insurance losses. It is provided in the California standard form policy that the insured must on demand of the insurer appoint a competent and disinterested appraiser and that the appraisers of the two parties shall then choose a competent and disinterested umpire, and that the three so selected shall appraise the loss.

Under the provisions of the policy the insured is given the right to bring a suit only when the failure of the appraisal is not attributable either to him or to his appraiser. Unless he has fully complied with these provisions of the policy, he may not bring a suit on the policy.

The principle of arbitration is now thoroughly engrafted as part of the law of California, not only in insurance matters but by a general arbitration statute.

1927 Laws of California, p. 404;
Sec. 1280, Code of Civil Procedure, et seq.

It was alleged as a defense by the primary insurance companies that "the appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him". That much was known at the time the trial started. The attitude of Hyland's appraiser, Colbert, was such that there was no doubt in the mind of the appraiser appointed by the company that he

would not agree to any competent disinterested umpire, but the reason for such attitude was not at that time known. But during the trial Colbert broke down under cross-examination and confessed himself to be entirely under the control of Hyland, confessed that he was receiving secret commissions from Hyland on sales of goods to Hyland by Newhall, Colbert's employer, and confessed that subsequent to the fire, at the bidding of Hyland, he had aided Hyland in drawing up six fictitious contracts to enable Hyland to show an exaggerated and fictitious loss in his use and occupancy insurance arbitration, that within thirty-six hours of the fire Colbert had asked Logie, a foremost authority on burlap prices on the Pacific Coast, not to give out any prices on burlap in connection with the Hyland loss.

Finally, Colbert confessed that during the course of this trial he had again aided Hyland in redrafting the fictitious contracts, changing only the price for use in this trial.

And yet appellant argues in his reply brief that Colbert was a "disinterested" appraiser. Realizing the weakness of his argument he argues that if not actually disinterested, that anyway he was entitled to have an appraiser who was in a measure biased and who should show an interest. He then argues that he is not bound by the acts of such an appraiser. He cites in support of his contentions that he is not bound by the failure of the appraisement the case of *Norwich Union Fire Ins. Society v. Cohn,* 68 F. (2d) 42, C. C. A. 10th. It is there said:

> "There can no longer be any doubt as to the validity of the appraisal clause in fire insurance policies. The insured, upon seasonable demand, must comply therewith or there can be no recovery. Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; Aetna Ins. Co. v. Murray (C. C. A. 10), 66 F. (2d) 289; St. Paul Fire & Marine Ins. Co. v. Eldracher (C. C. A. 8), 33 F. (2d) 675; Phoenix Ins. Co. v. Everfresh Food Co. (C. C. A. 8), 294 F. 51."

The court then decided in that case that having *"in good faith"* entered into one appraisal and there having been a failure of an appraisement award *"without his fault"*, he was not prevented from bringing suit and it was not necessary that he enter into a second appraisement. With this latter contention we are in entire agreement. There was no second agreement asked in the instant case and none could legally be asked because if an insured in good faith appoints an appraiser and the appraisement fails for reasons entirely outside of the control of the insured, he is not obligated to enter into a second one, and the policy provides that he may bring suit in such event.

But such were not the facts in this case. It is specifically found by the trial court (Rep. Tr. p. 197, Vol. I):

> "The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud."

Appellant never at any time "in good faith" appointed an appraiser and attempted to have an appraisal. As said in the *Norwich Union* case, supra:

> "Upon demand the insured must *in good faith* comply therewith; he must name a competent and disinterested appraiser and must not directly *or indirectly* prevent the making of an award."

When appellee's appraiser, Maris, accepted Colbert's nomination of Logie as an umpire, Colbert discovered that Logie did not believe there could be any out of sight loss from such a small fire in view of the fact that burlap will not burn out of sight in that kind of a fire. Logie testified:

> "Mr. Colbert replied that he was required to 'consult' in regard to that and later on in the day he phoned and told me that I had not better serve." (Tr. Vol. IV, p. 2162.)

Whom would he "consult" except Hyland, particularly in view of their close fraudulent connections?

Appellant quotes the case of *Norwich Union Fire Ins. Society v. Cohn,* supra, to the effect that the fault of an appraiser is not the fault of the party appointing him, but that case used such phraseology only in connection with an appraisement entered into "in good faith" by the insured. It did not refer to an appraisement such as this that was entered into in fraud.

Appellant has not cited one case that upholds his contention that an insured need only defeat an appraisal in order to be allowed to bring his suit. He so contends on page 30 of his brief when he states:

> "That without regard to appraisement, whether completed or not, the loss shall be payable in 90 days after the receipt of the preliminary proofs of loss."

We challenge appellant to cite any authority construing a policy such as is the subject of the litigation in this case where an insured acted in bad faith and did not appoint a competent and disinterested appraiser. Such a holding would nullify the arbitration clause in the policy. Any insured could prevent the appraisement by the mere device of appointing and controlling a servile or crooked appraiser.

For the first time the appellant, with new counsel, is raising the issue that Maris was not a competent and disinterested appraiser. Such issue was never raised during the trial and the case was tried only to determine whether Colbert was a competent and disinterested appraiser, he being the only appraiser as to whom such issue was raised. Neither in his pleadings, at the trial, nor on motion for new trial did appellant ever claim that Mr. Maris was not a competent and disinterested appraiser. Appellant now claims that there was no evidence on the disinterestedness of Mr. Maris. This is not correct. The evidence is to this effect, that Maris was an independent appraiser and adjuster, maintaining offices in San Francisco. He was independently chosen by six primary companies to represent them as an appraiser in this case. There is no evidence that he ever represented anyone of them in any case before, either as an appraiser or as an adjuster. Appellant himself placed in evidence the letter of Mr. Maris to Colbert, dated June 7, 1930, which stated (Tr. Vol. III, p. 1283):

> "Being entirely disinterested, the outcome of the proposition submitted to us as appraisers is

> of no moment to me, yet it seems unfortunate that it was apparently impossible for you to consider anyone as umpire unless that one was in some way connected with or beholden to the insured, their attorneys, your good self or the firm you represent. In closing, may I express the opinion that the failure to have and complete this appraisement is not attributable to me."

Furthermore, the correspondence immediately preceding the quotation cited above indicates that Mr. Maris demonstrated his disinterestedness by nominating people whom his investigation disclosed to be entirely disconnected with any of the parties, and some of whom he didn't even know, but relied upon recommendations of others of their disinterestedness and their competency. This in itself demonstrates his disinterestedness. The evidence placed in the record by the plaintiff himself is sufficient to sustain the finding that the defendant companies appointed a competent and disinterested appraiser, even if that matter were in issue.

Plaintiff cannot raise such an issue for the first time in the appellate court, and certainly his claim that there is no evidence showing the disinterestedness of Maris is not correct. Plaintiff supplied the evidence himself.

The utter unreliability of appellant's brief is shown by the fact that on page 23 he argues that Colbert was competent and disinterested because "such competency and disinterestedness is presumed". On page 28 he states that there must be proof that the appraiser ap-

pointed by the defendants was competent and disinterested and that as no proof had been made of this "the inference is to the contrary".

Appellant admits on page 26 of his reply brief that our citations of California authorities hold that unless the insured in good faith makes an effort toward securing an appraisement when demanded by the insurer, he cannot bring an action on the policy. However, he argues, these decisions were on policies prior to the California standard form. He cites no authority holding to the contrary under the California standard form, and such argument is utterly unconvincing because if the California courts held that the provision for an appraisement was binding and a condition precedent to institution of suit in the case of contracts drawn up by the insurance company, how could such decision be any the less applicable when the policy is not drawn up by either of the parties but is enacted by the legislature and required as a part of the law and public policy of the State of California? Certainly, when using the same phraseology the legislature intended to have the same interpretation of the policy and the courts have so held.

> "After the adoption of the Standard form of policy the law of waiver and estoppel remains the same as before upon the subject."
>
> *Raulet v. Northwestern Ins. Co.*, 157 Cal. 213.

In the case of *Old Sausalito Land Co. v. Union Ins. Co.*, 66 Cal. 253, it is particularly pointed out that the policy required an adjustment "or a fair effort on the part of the assured to obtain it", or else no cause of

action arose. There is no reason for construing the standard form policy any differently.

It hardly seems possible that appellant has read the opinion of the trial court and the findings of the trial judge in connection with the Colbert transaction. Over six pages of the transcript are devoted to that portion of the trial court's findings and opinion. (Vol. I, pp. 196-203.) The argument of appellant takes the form purely of assertion and reiteration, without answering the damning evidence summed up by the court and his findings that Colbert's connection with appellant was secret and tainted with fraud, that Colbert was not disinterested, that Colbert was in the secret pay of appellant, that appellant had bribed him and that the appellant also used Colbert as a tool in his attempt to obtain an excessive award for his loss at the U. & O. hearing.

In his reply brief appellant refers to his payments to Colbert as being "gratuities". (Reply Brief p. 19.) In gratitude for what, was appellant giving gratuities to Colbert? Could it not have been for value received? But merely calling it "gratuities" does not make it any the less a bribe.

Appellant's defense of the fictitious contract is certainly unique.

Appellant claims (Reply Brief p. 10) that the question of the fictitious contracts is wholly collateral and that the weight of the evidence is that there were no fictitious contracts. These contracts were directly in point, proving the contention of the primary insurance companies that plaintiff had not appointed a disinter-

ested appraiser and had prevented the appraisement. It was evidence of a relationship of fraudulent conspiracy between Hyland and Colbert. Appellant attempts to justify his claim that these contracts were not fictitious by quoting his own letter, which he wrote as a self-serving alibi, addressed to Newhall & Co. and delivered personally to Colbert (and which Colbert tore up). He next quotes his own testimony in which he categorically denied the making of these fictitious contracts and claimed that he considered them at all times bona fide contracts.

Now, it is pertinent to remark that not only did plaintiff deny that these contracts were fictitious and assert that they were bona fide contracts, but at the same sitting he also contradicted the testimony of witness after witness concerning all of the major issues that developed at the trial. This was near the end of the trial when he took the stand in rebuttal. Beginning at page 3231, Vol. VI of the record, he categorically denied the testimony, not only of Colbert, but also the testimony of Captain Sullivan (p. 3241), the testimony of Fire Marshal Kelly (p. 3242), the testimony of R. V. Smith (p. 3261) and the testimony of Mr. Grove (p. 3279). Some of these categorical denials of the plaintiff conflicted with positive testimony given by disinterested witnesses fortified by their written memoranda made at the time of the occurrences. His contradiction of R. V. Smith was in part concerning the testimony of Mr. Smith which was based directly upon a memorandum made at the time of conversation with Hyland. This rebuttal testimony of the

plaintiff could not be believed by any fair-minded judge. He simply added perjury on perjury.

His denial of making these fictitious contracts was the most incredible of all. This court did not witness the scene in the courtroom as did the trial judge when Colbert was recalled on cross-examination and confessed in open court that he was a felon, a knave, and an ingrate. He confessed that he had subjected himself to danger of criminal prosecution in aiding Hyland in preparing these fictitious contracts for use in collecting insurance. He confessed that after thirteen years as head of the import department, during which time he had enjoyed the confidence of his employers, the H. M. Newhall & Co., that he had betrayed them and had accepted secret commissions from Hyland. He confessed that he was under the domination of Hyland and even during the course of the pending trial had aided him in remaking the fictitious contracts with a difference in price; and, finally, that he had tendered his resignation to H. M. Newhall & Co. No fair-minded judge could find other than did the trial judge in this case (Vol. I, p. 199):

> "In the face of the evidence, plaintiff's contention that these contracts were valid is incredible."

And as to the conflict between Colbert and Hyland the trial judge stated (Rep. Tr. Vol. I, p. 200):

> "I believe Colbert's testimony as to this transaction."

These contracts were not merely collateral. The trial judge admitted the evidence regarding these fictitious

contracts because they showed that "the appraiser was not only not a disinterested one, but that he was fully cooperating with plaintiff in his fraudulent scheme". (Rep. Tr. Vol. I, p. 200.)

The findings of the trial court should not be overturned where there is evidence of such startling nature to sustain them.

AS TO OTHER MISSTATEMENTS IN APPELLANT'S BRIEF.

We have already pointed out to the court a number of misstatements by counsel for appellant. In our opening brief we pointed out numerous other misstatements and attempted to excuse them on the ground that counsel had not sat through the trial and was therefore probably somewhat unfamiliar with the evidence. We cannot excuse these on the same ground. We have picked out only a few of these at random and will call them to the attention of the court.

It is stated on page 10 of the reply brief that as to the fictitious contracts "no charge was there made (that is, in the use and occupancy matter) that they were fraudulent or invalid in any respect". There is no such testimony in this case, and we believe that we have thoroughly convinced this court that these contracts were fictitious.

It is stated on pages 17 and 18 that:

> "We believe it is significant that there was no testimony introduced that Newhall & Co. did not receive material such as was called for by these alleged fictitious contracts, and likewise it is sig-

> nificant that they did not permit appellant's accountant to make a general examination of their records."

In the first place, any evidence as to what Newhall & Co. may have received certainly would not be admissible. They were among the largest dealers in burlap on the coast, and the mere fact that they may have received two or three million yards, or even larger quantities of burlap, would not in any way tend to prove or disprove the issues in this case.

As to the second portion of this statement, it can be nothing more nor less than deliberate, as it appears that the only restrictions that Mr. Newhall put on Parker was that the examination was to be made in the office of their accountants, and that they would submit any documents Parker wanted. When he conveyed this information to Mr. Schmulowitz, the latter instructed Parker to drop the matter. (Tr. Vol. VI, p. 3310.)

On pages 20 and 21 it is claimed there was nothing secret about the allowance from Hyland to Colbert. This statement is based solely on the fact that there is a record of these allowances on Hyland's books. It is further stated that it is not apparent that Newhall & Co. ever suffered in the slightest from these relations between Colbert and Hyland, although, as we have pointed out, they did directly result in the cancellation of one contract and the reselling of the same merchandise to Hyland at a considerably lower figure. (See summary of testimony, Brief of Western Ins.

Co., pp. 64-65.) What other damage may have been suffered by Newhall & Co. as the result of allowing Colbert commissions we do not know.

On page 57 it is stated that:

> "It is apparent that the suggestion of Hood & Strong's report, Plaintiff's Exhibit No. 2, arose not from appellant but from an employee of a reputable accounting firm, Mr. Parker of Lybrand, Ross Bros. & Montgomery."

It is true that Mr. Parker had at one time been an employee of that firm, but that at all of the times involved in this litigation and referred to in the trial, or in the briefs, Mr. Parker was in the employ of, and in the office of appellant. Such a statement could be made only for the purpose of attempting to convince this court that Parker was a disinterested party when he was actually an employee of Hyland.

On page 87 it is stated:

> "Smith was the head of the adjusters and whatever he did was agreeable to the others."

In appellant's opening brief it was stated in several places that Smith represented all of the appellees. When this was pointed out as a misstatement, counsel, without one word upon which to predicate such a statement, and contrary to the fact, incorporates the foregoing in the brief.

On page 89 it is stated:

> "Many serious mistakes of fact and law appear therein. As one instance of fact, we refer to the

court's statement that 'if the quantity of merchandise claimed to have been obliterated, had been in the factory at the time of the fire * * * the building * * * would have been taxed with a load beyond its capacity'. (V. I, p. 193.) Counsel now admit that this statement, argument, or finding is erroneous. (Brief of Western Insurance Co. of America, p. 186.) That such a prejudicial statement is not correct, removes the presumption of correctness from other statements in the opinion."

Such a statement could not be otherwise than deliberate. The statement of the court quoted refers to the question of the 100 tons of debris which we have demonstrated in our briefs would have filled each of the floors of the building to the same extent as the model of the second floor which appellant so bitterly attacks. This is discussed in detail on pages 82 to 85 of the brief of Western Insurance Company of America. It is true that we admit that we do not claim that merchandise of the value of $132,000 would have overtaxed the building, but immediately following this we reiterate our claim that merchandise represented by the claim of debris would have been more than the building would have held.

Again, on page 91, we have another instance.

It will be remembered that we set forth on page 190 of the brief of the Western Insurance Company, the following:

"Mr. Thornton. In addition to that I would like to point out this fact: *You will remember we*

have asked for an examination of these very carefully kept books, but so far we have been deprived of any examination.

Mr. Schmulowitz. Evidently the Court thought you were not entitled to an examination at the time you asked for it." (Rep. Tr. pp. 31-33.) (Italics ours.)

In an attempt to offset this, counsel would mislead this court by referring to a portion of the testimony of Hart, showing that when he was in the employ of other parties in the fall of 1929 and made an investigation for certain purposes in connection with use and occupancy insurance, he was not prevented from looking in the books. On this statement counsel would have this court infer that appellees, who were not in any way connected with the use and occupancy insurance, were permitted to examine plaintiff's books. As a matter of fact, such an examination was not permitted until after the trial had progressed for several weeks, and then only under very distinct and positive orders of the trial court.

We respectfully submit that this court should affirm judgment.

Dated, San Francisco,
May 22, 1936.

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